

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LORENZO GRAYSE,

Defendant-Appellant.

UNPUBLISHED

March 2, 2004

No. 244069

Wayne Circuit Court

LC No. 01-008678

Before: Borrello, P.J., and White and Smolenski, JJ.

PER CURIAM.

Defendant was convicted as charged of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b. He was sentenced to concurrent sentences of 81 months' to 15 years' imprisonment for the armed robbery conviction and 2 to 5 years' imprisonment for his felon in possession of a firearm conviction, which were to be served consecutively to the two-year sentence for his felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant argues that he was denied a fair trial when the prosecutor stated in his rebuttal argument that defendant was presenting a "Plan B" defense from the television show "The Practice." A claim of prosecutorial misconduct is reviewed in context to determine whether the defendant was denied a fair and impartial trial. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). However, because defendant did not object at trial, we review for plain error only affecting defendant's substantial rights. *Id.*

The prosecutor began his rebuttal argument as follows:

Plan B. You have heard explained Plan B.

Counsel was talking on about TV. He told you on voir dire this is not TV versus the real world.

I can't help but use that analogy from TV because you see on the show called The Practice they have a plan called Plan B if all defenses fail.

If everything points to a defendant, what do you do? Plan B.

What is plan B? Get somebody to come and say somebody else did it. Why? I'm going to tell you why.

What interest does Mr. Gamble have to do this? It's very simple. You have one person on trial, this defendant. You get one person outside not charged with a crime so he cannot be convicted by you, and you got a third party that we can blame. So plan B gets everybody away.

Mr. Gamble comes in. All he needs to do, the witness, is put doubt in your mind. Don't have to prove anything to you.

Counsel is right. They don't have to. We only need a doubt. Where are we going to bring the doubt from. Plan B.

Defendant asserts that the prosecutor's comments "overtly shifted the focus from the evidence to defense counsel's personality" and "plainly conveyed to the jurors that defense counsel was trying to confuse or trick them because he did not believe in his client's innocence."

Defendant argued that the victim's identification was unreliable and that there was testimony from Mr. Gamble indicating that although defendant was in the area at the time of the robbery, he was not involved in it. A prosecutor's comments must be considered in light of the defense arguments. *People v Knowles*, 256 Mich App 53, 61; 662 NW2d 824 (2003). Viewed as a whole, it is clear that the prosecutor's rebuttal argument was aimed at debunking defendant's bases for reasonable doubt by arguing that defendant's theory and Mr. Gamble were not worthy of belief. Both are permissible arguments. *People v Reid*, 233 Mich App 457, 478; 592 NW2d 767 (1999). While the prosecutor's reference to "Plan B" in context of "The Practice" was unfortunate, we find the substance of the argument was not improper.

Moreover, defendant fails to prove prejudice. A cautionary instruction could have cured any resultant prejudice. And the jury was instructed that the lawyer's arguments were not evidence. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486, 581 NW2d 229 (1998).

Defendant also argues that his due process rights were violated when the police failed to electronically record his interview, relying on *Stephan v State*, 711 P2d 1156 (Alas, 1985). However, in *People v Fike*, 228 Mich App 178, 184-186; 577 NW2d 903 (1998), this Court rejected the same argument, which relied on the same case, proffered here by defendant. *Fike* did leave open the possibility that failure to electronically record a defendant's statement may violate due process if the failure was "so 'fundamentally unfair' that the concept of justice was offended." *Id.* at 186. However, in this case, defendant does not present any claim of material misconduct on the part of the police, i.e., that he was threatened or coerced, did not waive his constitutional rights, or was incapable of voluntarily waiving his rights due to some disability.

Therefore, we find that the court did not commit error requiring reversal in admitting defendant's statement.

Affirmed.

/s/ Stephen L. Borrello
/s/ Helene N. White
/s/ Michael R. Smolenski